92-1168

No. 92-_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

TERESA HARRIS

Petitioner

v.

FORKLIFT SYSTEMS, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a plaintiff in a sexual harassment case also required to prove, in order to prevail, that she suffered severe psychological injury when the Trial Court has found that she was offended by conduct that would have offended a reasonable victim in the position of the plaintiff?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit

entered in the above-entitled proceeding on September 17, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported.

The opinion of the United States District Court for the Middle District of Tennessee has not been reported.

STATEMENT OF JURISDICTION

Petitioner filed her Complaint seeking damages and injunctive relief for alleged violations of 42 U.S.C. § 2000(e) in the United States District Court for the Middle District of Tennessee on July 7, 1989.

The case was tried before the United States Magistrate who issued his Report and

Recommendation on Petitioner's Complaint on November 28, 1991.

Petitioner filed timely objections to the Report and Recommendation which was adopted by the District Court on January 18, 1991.

Petitioner filed a timely notice of appeal with respect to the case on the merits. The District Court also issued a ruling on Petitioner's Motion for Attorney Fees and Costs arising from Respondent's failure to admit certain facts from which both parties appealed. Petitioner is not seeking review of the decisions below on her Motion for Attorney Fees and Costs.

On September 17, 1992, the Sixth Circuit issued its opinion affirming the District Court. No Petition for Rehearing was filed.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

§ 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a):

It is unlawful employment practice for an employer --

. . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE[1]

Teresa Harris was employed as Rental Manager of Forklift Systems, Inc., from April 22, 1985 until October 1, 1987. She was initially assigned responsibility for management of leased equipment and sales coordinator for the sales department.

Forklift Systems, Inc. (hereinafter "Forklift") is a Tennessee corporation in the business of selling, leasing and repairing forklift machines and is an employer within the meaning of 42 U.S.C. §§ 2000(e)-(b).

Of the six managers employed by Defendant during the period of Ms. Harris' employment, four were male and two were female. Other than Ms. Harris, the remain-

[1]Extensive findings of fact were made by the Magistrate. No objections to the findings were made by the Respondent.

ing female manager was the daughter of the President of Forklift.

During the course of Teresa Harris' employment, Charles Hardy, the President of Forklift, directed sex-based derogatory conduct towards Teresa Harris including the following:

(a) Hardy stated to Ms. Harris in the presence of other employees of Forklift "You're a woman, what do you know," on a number of occasions during the period of plaintiff's employment, and "You're a dumb ass woman," at least once;

(b) Hardy, on a number of occasions, stated to Ms. Harris in the presence of other employees of Forklift, "We need a man as the rental manager."

(c) Hardy, in front of a group of other employees of Forklift and a Nissan factory representative stated to plaintiff,

"Let's go to the Holiday Inn to negotiate your raise." However, Ms. Harris knew this was meant as a joke, and treated it as a joke at the time.

(d) Hardy asked Ms. Harris and other female employees, but not male employees of Forklift, to retrieve coins from his front pants pocket.

(e) Hardy threw objects on the ground in front of Ms. Harris and other female employees of Forklift, but not male employees, and asked them to pick the object up, thereafter making comments about female employees' attire.

(f) Hardy commented with sexual innuendos about clothing worn by Ms. Harris and other female employees of Forklift, but not male employees.

(g) Hardy directed Ms. Harris to bring coffee into a manager meeting on at

least one occasion, a request he did not make to male managers.

(h) In September, 1987, after Ms. Harris complained to Mr. Hardy about his sexually derogatory behavior, Mr. Hardy asked Teresa Harris in front of other employees of Forklift, "What did you do, promise the guy at ASI (Alladin Synergetics, Incorporated) some 'bugger' Saturday night?"

As many of the statements and actions of Charles Hardy made specific reference to the female gender ("You're a dumb ass woman") ("What did you do, promise the guy at ASI some 'bugger' Saturday night?"), they were clearly directed to Ms. Harris because she was female.

Rather than dispute these statements and actions, Charles Hardy took the position at trial they were only intended as

"jokes," and were not taken by other female employees as serious. Three female clerical employees testified that they did not take the "coin" behavior seriously. However, Stephanie Vanns, Mr. Hardy's secretary, testified that she could understand how and why another person could have taken it otherwise. David Thompson, a former employee of Defendant, testified that he would not tolerate Charles Hardy talking to his wife as Charles Hardy talked to Teresa Harris at Forklift.

The behavior, conduct and actions by Charles Hardy escalated in frequency, tone and severity over the course of Ms. Harris' employment. At first, Ms. Harris tried to ignore Mr. Hardy's offensive behavior and conduct by not talking to him.

Ms. Harris testified she had spoken to Charles Hardy in 1986 about the general

manner in which he was treating her during her employment, but she did not complain to him specifically about the sexually offensive nature of his conduct and actions until August 18, 1987.

By mid-1987, Ms. Harris was experiencing extreme anxiety and emotional upset because of Mr. Hardy's behavior: she did not want to go to work; she cried frequently; she began drinking heavily outside of work; and her relationship with her children became strained.

On August 18, 1987, Ms. Harris met with Charles Hardy to complain about his abusive and harassing behavior. During the meeting he admitted to many of the actions but said that he was only "joking." He stated that he did not realize that his actions bothered Ms. Harris and promised to change his behavior. Ms. Harris had en-

tered the meeting with the intent of resigning. Mr. Hardy's apology and intent to reform resulted in Ms. Harris changing her mind. Ms. Harris secretly taped the conversation without Mr. Hardy's knowledge.

Notwithstanding his promise to change his behavior, within a short period of time, however, the same offensive and harassing behavior she had previously complained about began again. In a statement in front of other employees, in mid-September, Mr. Hardy stated that Ms. Harris had promised sexual favors to secure an account from a client. Mr. Hardy never disputed that he made the statement.

At that point, Ms. Harris realized that Mr. Hardy would never change and that, in order to preserve her self-respect and avoid his antagonizing, derogatory and demeaning behavior directed towards her

because she was a woman, she would have to leave her job which she did on October 1, 1982.

In the ruling below, the District Court found that Charles Hardy's behavior was crude and vulgar and would have offended a reasonable female manager. However, because the District Court did not find that Teresa Harris suffered serious psychological injury, her action was dismissed.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT CONFLICT AMONG SIX CIRCUIT COURTS OF APPEALS ON THE QUESTION OF WHETHER A TITLE VII PLAINTIFF MUST DEMONSTRATE THAT THE OFFENSIVE CONDUCT SERIOUSLY AFFECTED HIS OR HER PSYCHOLOGICAL WELL-BEING.

Employment discrimination on the basis of sex remains a matter of significant public concern. United States Merit Protection Board. *Sexual Harassment in the Federal Government: An Update* (1988); see, Civil Rights Act of 1991, § 202, 42 U.S.C. § 2000(e).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., provides that "it is unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment . . .

because of such individual's race, color, religion, sex, or national origin. Title VII invests in employees the right to work in an "environment free from discriminatory intimidation, ridicule and insult." Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed. 2d 49 (1986).

In 1986, this Court found that a hostile working environment in violation of Title VII where sexual harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Meritor, 477 U.S. at 67, 106 S.Ct. at 2405, (1986).

The Court also observed that "one can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group

workers." Meritor, 477 U.S. at 66, 106 Sup.Ct. at 2405, Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2nd 343 (1972).

However, this Court did not at that time, nor since, further clarify what degree of psychological injury, if any, a sexual harassment plaintiff must prove in order to prevail in his or her claim.

Without clear guidance from this Court, the Circuit Courts of Appeals have divurged on whether a Title VII plaintiff must necessarily prove that he or she has suffered serious psychological injury as a result of sexually offensive conduct.

Three Circuits, the Sixth, as in this case, the Seventh and the Eleventh, have concluded that in a sexual harassment case, a plaintiff must not only prove that the complained of conduct would have offended a

reasonable victim and that he or she was actually offended, but also that he or she suffered serious psychological injury as a result of the conduct. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986); Scott v. Sears Roebuck, 798 F.2d 210 (7th Cir. 1986); Brooms v. Regal Tube, 830 F.2nd 1554 (11th Cir. 1987).

On the other hand, three other Circuits, the Third, the Eighth, and the Ninth, have concluded that a Title VII plaintiff must only show that he or she has been offended and that the complained of conduct would have offended a reasonable victim. Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990); Burns v. MacGregor Electronic Ind., Inc., 955 F.2d 559 (8th Cir. 1992); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

This Court should grant certiorari to resolve the divurgent analyses among the Circuit Courts of Appeals with regard to whether a necessary element of Title VII sexual harassment case is that the plaintiff prove that he or she suffered serious psychological injury as a result of the complained of behavior.

II. THE DECISIONS BELOW RAISES IMPORTANT QUESTIONS REGARDING THE STANDARD OF PROOF IN A SEXUAL HARASSMENT CASE.

Although this Court held in Meritor Savings Bank v. Vinson, that a sexual harassment claim can be based on a hostile work environment theory under Title VII, the Court provided limited guidance regarding the necessary elements of proof for a successful claim. Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed. 2d 49 (1986).

In the Vinson case, this Court held that a Title VII violation may be proved a showing that discrimination based on sex has created a hostile or abusive work environment and such harassment must be sufficient enough to effect a "term condition or privilege" of employment within the meaning of Title VII. Thus, "for sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of (the victim's) employment' and create an abusive working environment." Meritor Savings Bank v. Vinson, 477 U.S. at 67, 106 S.Ct. at 2405 (1986).

In reaching this decision, this Court relied upon prior decisions of the Fifth and Eleventh Circuit Courts of Appeal as well as Guidelines that had been adopted by the Equal Employment Opportunity Commission. Rogers v. EEOC, 454 F.2d 234 (5th

Cir. 1971) cert denied, 406 U.S. 957, 92 S.Ct. 2058 (1972); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); *Guidelines on Discrimination Based on Sex*, 29 C.F.R. 1604.11 (1980).

Prior to Vinson, liability based upon a hostile racial environment had been recognized by numerous circuit courts of appeals and extended to include harassment based on religion and national origin. The Court then went on to note that "nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." Meritor Savings Bank v. Vinson, 477 U.S. at 67, 106 S.Ct. at 2399 (1986).

The Court then specifically recognized that a Title VII violation may be established by proving discrimination based on sex has created a hostile or abusive work

environment referring with approval to the Henson case.

Finally, the Court relied upon the Guidelines promulgated by the Equal Employment Opportunity Commission observing that prohibited sexual harassment may arise where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. Meritor Savings Bank v. Vinson, 477 U.S. at 65, 106 S.Ct. at 2404 citing *Guidelines on Discrimination Based on Sex*, 29 C.F.R. 1604.11(a)(3).

The case of Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) was the first Circuit Court of Appeals case applying the Vinson ruling to a sexual harassment complaint.

In that case, the Sixth Circuit itemized the elements of a Title VII claim for sexual harassment as follows:

> (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability. Rabidue, 805 F.2d at 619-620.

Without any specific citation to Vinson, the Sixth Circuit incorporated dicta from the Rogers case, imposing on a plaintiff that he or she also established that his or her psychological well-being was affected by the complained of conduct. see Rogers v. EEOC, 454 F.2d 234 at 238 (5th Cir. 1971).

Relying on Rabidue, Eleventh Circuit Court of Appeal also incorporated, within its standard, the requirement that a sexual harassment plaintiff establish that he or she suffered serious psychological injury as a result of the offensive conduct. Brooms v. Regal Tube, 830 F.2d 1554 (11th Cir. 1987). The Seventh Circuit modified this requirement somewhat to the effect that the plaintiff must document that he or she has suffered anxiety and debilitation.

Scott v. Sears Roebuck, 798 F.2d 210 (7th Cir. 1986).

The majority opinion in Rabidue, however, was countered by a strong dissent by Judge Keith who lodged three main criticisms of the majority's analysis. First, rather than analyze such cases from a reasonable person's perspective, the view of the reasonable victim should be taken:

> Unless the perspective of the reasonable victim is adopted, courts . . . [will] sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men. Rabidue, 805 F.2d at 626. (J. Keith, dissenting).

It appears that Judge Keith's reasoning, in this respect, has since been adopted by the Sixth Circuit. Yates v. Avco Corp., 819 F.2d 630, 637, n. 2 (6th Cir. 1987).

Second, the majority held that in determining whether sexual harassment created an offensive working environment,

the prevailing work environment had to be considered as well as the background of the plaintiff's co-workers and superiors. Rabidue, 805 F.2d at 620. Judge Keith argued that the purpose of Title VII is "to prevent said behavior from poisoning the work environment of classes protected under the Act." Rabidue, 805 F.2d at 626. (J. Keith, dissenting). Thus, the background of the defendant and co-workers is irrelevant. Id. at 627.

The Sixth Circuit appears to have now adopted Judge Keith's reasoning in this regard as well in its decision in the case of Davis v. Monsanto Chemical, 858 F.2d 345 (6th Cir. 1988). As the Court stated:

> Title VII was not intended to eliminate immediately all private prejudice and biases. That law, however, did alter the dynamics of the workplace because it operates to prevent bigots from harassing their co-workers . . . By informing people that the expression of racist or sexist attitudes in

> public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society. Davis, 858 F.2d at 350.

The facts in Davis concerned allegations of a racially hostile environment and the Court distinguished the elements for such a cause of action from a sexually hostile environment.[2] However, the reference to both "racist and sexist" attitudes in the above quotation clearly indicates that existing attitudes and behavior of either type are not to be tolerated.

Finally, Judge Keith suggested that anti-female language and behavior, would per se, affect the psychological well-being of a reasonable woman victim. Rabidue, 805 F.2d at 626 (J. Keith, dissenting). As

[2]The Sixth Circuit, thus, requires a higher standard of proof in a hostile environment case based on gender than in one based on race.

such, he suggested that the elements of proof in a sexual harassment case should focus on whether the conduct would offend a reasonable victim rather than whether the victim suffered serious psychological injury. Rabidue, 805 F.2d at 627 (J. Keith, dissenting).

As noted above, at least two circuits have adopted approaches similar to Judge Keith's, rejecting or diminishing any requirement that a plaintiff prove that the offensive behavior seriously affected his or her psychological well-being. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469 (11th Cir. 1990). Rather, the Ninth and Eleventh Circuits have focused their analysis on the harasser's conduct.

In addition, The Equal Employment Opportunity Commission has been critical of

the standard adopted by the Sixth, Seventh and Eleventh Circuits requiring that a Title VII plaintiff establish that he or she has suffered serious psychological injury. *EEOC Policy Guidance on Current Issues of Sexual Harassment, CCH Employment Practices*, ¶ 5258 at 6928, March 19, 1990. As the Commission notes, "it is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the working environment of a reasonable person." Id. ¶ 5258 at 6928, n. 20.

Following the reasoning of the EEOC Guidance, the Ninth Circuit has eliminated separate consideration of any subjective element beyond whether the harassment was unwelcome. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991). As noted above, the Ninth Circuit holds that so long as the

harasser's conduct is pervasive and the harassment is unwelcome, a hostile environment claim should be sustained. Ellison at 878.

The Petitioner would invite this Court to consider the holdings of the courts below to the extent that they require a plaintiff to prove that she or he suffered serious psychological injury in order to prevail in a sexual harassment case.

Under the standard established in the Ellison and Andrews cases and in the EEOC Guidance on Sexual Harassment, the findings below that Teresa Harris was the subject of a continuing pattern of sex-based derogatory conduct from Charles Hardy and that Mr. Hardy's conduct offended Teresa Harris and would offend a reasonable woman manager, should be sufficient to grant judgment to

Teresa Harris on her sexual harassment claim.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDICES

NOT RECOMMENDED FOR PUBLICATION

Nos. 91-5301/5871/5822

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERESA HARRIS,	)	
	)	
Plaintiff-Appellant	)	
(91-5301)	)	
Plaintiff-Cross Appellant	)	
(91-5871)	)	
Plaintiff-Appellee,	)	ON APPEAL FROM
	)	THE UNITED
v.	)	STATES DISTRICT
	)	COURT FOR THE
FORKLIFT SYSTEMS, INC.	)	MIDDLE DISTRICT
	)	OF TENNESSEE.
	)	
Defendant-Appellant	)	NOT RECOMMENDED
(91-5822)	)	FOR FULL-TEXT
Defendant-Appellee/	)	PUBLICATION.
Cross-Appellee.	)	Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy

must be served on other par ties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: NELSON, NORRIS and SUHRHEINRICH, Circuit Judges

PER CURIAM. Plaintiff, Teresa Harris, appeals from a judgment of the district court dismissing her complaint, and also from an order declining one of her requests for an award of sanctions stemming from defendant's failure to make admissions. Defendant, Forklift Systems, Inc., appeals the award of sanctions that the district court did enter in response to plaintiff's other request.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are not persuaded that the

district court erred in either of the orders appealed from.

As the reasons why judgment should be entered for defendant and sanctions should be awarded in the one instance and declined in the other, have been articulated by the district court, the issuance of a written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the orders of the district court are affirmed upon the reasoning found in the report and recommendation of the magistrate judge filed on November 27, 1990, and the memorandum opinion of the district court dated May 21, 1991.

FILED: September 17, 1992

LEONARD GREEN, Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERESA HARRIS,	)	
	)	
VS.	)	DOCKET NO. 3-89-0557
	)	
FORKLIFT SYSTEMS, INC.	)	

ORDER

The Court is in receipt of the Report and Recommendation issued by the Magistrate in the above-styled action, the plaintiff's objections and memorandum in support thereof, and the defendant's response to plaintiff's objections. Finding the objections to be without merit, the Court hereby ADOPTS the Magistrate's Report and Recommendation, and accordingly the case is DISMISSED.

Entered this 4th day of February, 1991.

/s/ Judge John T. Nixon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERESA HARRIS	)	
	)	
v.	)	NO. 3:89-0557
	)	
FORKLIFT SYSTEMS, INC.,	)	

TO: Honorable John T. Nixon,
District Judge

REPORT AND RECOMMENDATION

Plaintiff filed this claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e on July 7, 1989. The matter was referred to the undersigned as Special Master on July 21, 1989, pursuant to the provisions of 42 U.S.C. § 2000e-5(f)(5), Federal Rules of Civil Procedure 53, and the Local Rules of Court. Following a first meeting of the parties, a scheduling order was entered and trial was heard before the undersigned on July 23, 1990.

Plaintiff, the former Rental Manager for defendant Forklift Systems, Inc. ["Forklift"], claims that she was constructively discharged because of a sexually hostile work environment created by Forklift's President, Charles Hardy. Defendant's theory is that plaintiff walked off the job on October 1, 1987, because defendant had terminated its business relationship with plaintiff's husband. The following are my findings of fact, conclusions of law, and recommendation for disposition.

FINDINGS OF FACT

The parties agree that Title VII jurisdictional requirements are met in this case. Plaintiff, Teresa Harris, is a female citizen of the United States and the

State of Tennessee. At all times pertinent to this action, plaintiff has been a resident of Davidson County, Tennessee. Plaintiff was employed by Forklift as a Rental Manager from April 22, 1985, until October 1, 1987. At all times relevant, Charles Hardy was, and still is, President of Forklift.

Forklift is a Tennessee corporation with its principal place of business at 884 Elm Hill Pike, Nashville, Tennessee. Defendant is in the business of selling, leasing and repairing forklift machines. Defendant is an employer within the meaning of 42 U.S.C. § 2000(e).

Plaintiff was initially assigned responsibility for management of leased equipment and sales coordinator for the

sales department. Plaintiff earned $13,796 in salary, commissions, and bonuses from April 22, 1985, through the end of 1985; $30,024 in 1986; and $26,051 through September 30, 1987.

Of the managers employed by Forklift during the period of plaintiff's employment, four were male and two were female. Other than plaintiff, the remaining female manager was Charles Hardy's daughter. During the time of plaintiff's tenure the Service Manager was Mike Moseley, Office Manager was Kathy Kernell, Parts Managers were John Garrett and then David Matthews, Sales Manager was Dick Read, and the Comptroller was Bennie Lawson.

Plaintiff was a manager paid on a base salary plus commission. All other managers

but one were paid strictly a base salary. The net result was that plaintiff was making more than all but one of the managers, Dick Read. Overall, plaintiff's compensation increased during her tenure at Forklift.

Plaintiff was treated and compensated differently from other male managers in the following respects: 1) she received a smaller bonus in 1987 than the Service Manager and Comptroller, both of whom were males; and 2) she was reimbursed for her travel expenses on a per mile basis while the other managers either received a company car or a monthly car allowance.

However, these discrepancies are attributable to factors other than sex discrimination. Bonuses were distributed

primarily on the basis of longevity. The three managers who had been employed at Forklift longer than plaintiff received larger bonuses than she did, and the one with less tenure than plaintiff, David Matthews, received less of a bonus than she did. An additional factor affecting bonus was compensation method; plaintiff and Mr. Matthews, the two managers with the lowest bonus, were on a commission plan, and thus had control over their income. The three managers on strictly a base salary plan were paid higher bonus.

Plaintiff was not afforded a company car nor did she receive a set car allowance, because the amount she drove her car for the company did not economically justify her receiving these benefits. The

Service Manager had a company car because he was on 24-hour call. The Sales Manager had a company car because he was responsible for sales in both Tennessee and Kentucky, and did a lot of driving. The Office Manager and Comptroller were paid a monthly car allowance because they did a lot of running around town and had high mileage, and so it was simpler for the company to give them a flat fee rather than have them keep track of their mileage. The Office Manager received a company car in 1987 because she was then required to travel to an office in Kentucky.

Plaintiff was initially denied a separate office when Forklift relocated its place of business in November, 1986. This was rectified after plaintiff complained to Charles Hardy.

On one occasion plaintiff was directed by Hardy to bring coffee into a meeting, a request which he did not make of male managers. Plaintiff was the object of a continuing pattern of sex-based derogatory conduct from Hardy, including the following:

(a) Hardy stated to plaintiff in the presence of other employees at Forklift, "You're a woman, what do you know," on a number of occasions during the period of plaintiff's employment, and "You're a dumb ass woman," at least once.

(b) Hardy, on a number of occasions, stated to plaintiff in the presence of other employees at Forklift, "We need a man as the rental manager."

(c) Hardy, in front of a group of other employees at Forklift and a Nissan factory representative stated to plaintiff, "Let's go to the Holiday Inn to negotiate your raise." However, plaintiff knew this was meant as a joke, and treated it as a joke at the time. This comment must be viewed in context of the fact that the company often conducted management meetings at a nearby Holiday Inn.

(d) Hardy asked plaintiff and other female employees, but not male employees of Forklift, to retrieve coins from his front pants pocket.

(e) Hardy threw objects on the ground in front of plaintiff and other female employees of Forklift, but not male employ

ees, and asked them to pick the object up, thereafter making comments about female employees' attire.

(f) Hardy commented with sexual innuendos about clothing worn by plaintiff and other female employees of Forklift, but not male employees.

Plaintiff testified that by August, 1987, she was experiencing anxiety and emotional upset because of Hardy's behavior. She did not want to go to work; she cried frequently and began drinking heavily; and her relationship with her children became strained.

Forklift had notice of the harassment. The harasser was President of the defendant company, and on August 18, 1987, plaintiff met with Hardy to complain about his treat

ment towards her. Plaintiff secretly taped a portion of this August 18th meeting with Hardy, and transcribed the tape herself. The transcription of the tape indicates that Hardy had no prior knowledge that plaintiff was offended by any of his conduct. During the meeting between plaintiff and Hardy, he admitted making some of the comments, but said they were "jokes." He also apologized and promised that his offensive behavior would cease. Based upon his assurances, plaintiff did not resign as she had threatened earlier in the meeting.

Shortly after the August 18th meeting, Hardy's offensive behavior began again. In early September, Hardy made a remark to plaintiff suggesting that she promised sexual favors to a customer in order to

secure an account: Hardy asked plaintiff in front of other employees of defendant, "What did you do, promise the guy at ASI (Alladin Synergetics, Inc.) some 'bugger' Saturday night?"

On Thursday, October 1, 1987, plaintiff collected her pay check and left her place of employment. On Friday, October 2, 1987, plaintiff met with her attorney; and on Monday, October 5, 1987, plaintiff filed her EEOC complaint.

Until that time plaintiff quit Forklift, a social relationship existed between Mr. and Mrs. Hardy and plaintiff and her husband. The couples went out together on more than one occasion. It appeared to plaintiff's co-workers that she had a good working relationship with themselves and

with Hardy. Plaintiff would sometimes drink beer with her co-workers after hours, and would join in the conversations, sometimes with coarse language.

Other females employed at Forklift were not offended by Hardy's vulgar sexual comments. Several clerical employees formerly employed at Forklift testified that Hardy's frequent jokes and sexual comments were just part of the joking work environment at Forklift. They were not offended, nor did they know that plaintiff was offended. Angela Hicks, formerly a receptionist at Forklift, aptly expressed her feelings about comments Hardy may have made about her body. Ms. Hicks jauntily testified, "lots of people make comments about my breasts."

Plaintiff was good at her job, and did not receive any substantial criticism from Hardy. Annual reviews at Forklift are informal. Plaintiff did not feel that her 1987 annual review was adequate, but there is no proof that other managers received a more thorough review than did plaintiff.

After plaintiff filed her EEOC complaint, Hardy went back into his desk calendar and plaintiff's personnel file and made some notes in order to manufacture a justification for her termination. Albert Lyter, a forensic chemist experienced in ink pen chemical analysis, testified that Hardy probably made the notations in his desk calendar and personnel file on some date after January 1, 1988. These notes indicate that Hardy was considering termi

nating plaintiff because she could not get along with the receptionist. In fact, former receptionists testified that they had no real problems with plaintiff. There is no credible proof that Hardy was ever dissatisfied with plaintiff's job performance or ever intended to fire her.

Hardy and plaintiff's husband, Larry Harris, had a business relationship during the time of plaintiff's employment at Forklift. Larry Harris' business, Cellular Power, sold batteries to Forklift for use in the forklift machines. On October 7, 1987, Forklift canceled its account with Cellular Power. The cancellation occurred orally in a phone conversation between Larry Harris and Hardy's secretary, Stepha

nie Vanns, and was confirmed by a letter from Ms. Vanns to Mr. Harris dated October 7, 1987.

Larry Harris owed Hardy money on a loan, which Harris had used to finance Cellular Power. After Forklift canceled its account with Cellular Power, Hardy stopped making payment on the note and Hardy sued Harris in state court.

CONCLUSIONS OF LAW

Assignment of credibility was difficult in this case. Defendant attempted to show that the sole reason plaintiff quit at Forklift was because Hardy terminated Forklift's account with Cellular Power. Hardy testified that the business relationship between himself and Mr. Harris had

been deteriorating for some time, and that he informed Harris that his account was terminated in late September, prior to the date plaintiff walked off the job. Plaintiff testified that she had no information that the business relationship was deteriorating, and that it was the norm for Hardy to do business with her husband's competitors as well as her husband. Larry Harris also testified that he had no knowledge the relationship was deteriorating until the account was terminated by Stephnie Vanns on October 7th.

I am certain that Hardy's business relationship with plaintiff's husband played more of a role in plaintiff's dissatisfaction with her job than plaintiff admitted. Business relationships rarely

deteriorate just like that, especially between social friends and in light of Hardy's financial interest in Cellular Power. It must have been a financial blow to Cellular Power to lose the Forklift account, and I do not doubt that plaintiff had some bitter feelings towards Hardy over this.

However, I do not assign much credibility to Charles Hardy. Hardy's credibility is damaged by the proof that after plaintiff left Forklift, Hardy went into his desk calendar and doctored it up to make it look as if he was displeased with plaintiff's job performance. Furthermore, plaintiff's version of the facts regarding the timing of the breakdown of Forklift's relationship with Cellular Power is corrob

orated by a letter from Stephine Vanns to Larry Harris dated October 7th, indicating that the Cellular Power account was not terminated until that date. See Plaintiff's Exhibit 10. Thus, it is just as likely that Charles Hardy cut the business relationship with Cellular Power because plaintiff quit and filed the EEOC charge as it is likely that plaintiff quit because of the deteriorating business relationship. I will thus discount defendant's theory of this case, and examine whether the proof bears out plaintiff's allegations of Title VII violations.

I believe that Hardy is a vulgar man and demeans the female employees at his work place. Many clerical employees tolerate his behavior and, in fact, view it as

the norm and as joking. Plaintiff presented no testimony from other female Forklift employees indicating that they found Hardy's behavior to be offensive or that a hostile work environment existed. This does not mean, however, that plaintiff, a managerial employee, took it the same way. In fact, I believe she did not. She believed that Hardy's sexual comments undermined her authority; this was especially painful when Hardy would make demeaning sexual comments to plaintiff in front of her co-workers. Why plaintiff kept this to herself until August 18, 1987, I do not know.[1] Plaintiff denies that she did, but

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[1]I do not assign much credibility to the testimony of Dick Read, who stated that plaintiff did express her displeasure to Hardy prior to this date. Dick Read was terminated from Forklift and I believe he still holds quite a grudge against Hardy. He has testified for the Harris' against Hardy in prior State court litigation regarding Cellular Power and the promissory note.

the tape plaintiff made of the private August 18th meeting between herself and Hardy reveals that prior to this date Hardy really did not know that plaintiff viewed his conduct as other than joking.

I conclude that plaintiff was not able to prove that Hardy's conduct was so severe as to create a hostile work environment for plaintiff at Forklift. Nor was plaintiff able to show that she was treated disparately as to other terms or conditions of employment. Thus, I recommend that plaintiff's Title VII claims be dismissed.

Hostile Work Environment

Plaintiff makes several claims that she was subjected to disparate treatment in regard to the terms and conditions of her

employment. One of the conditions about which plaintiff complains is a sexually hostile work environment.

Sexual harassment which creates a hostile work environment is discrimination on the basis of sex within the meaning of Title VII. Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 LEd.2d 49 (1986). Sexual harassment includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11a (1985), quoted in Vinson, 477 U.S. at 65. Sexual harassment is actionable under Title VII whether or not it results in economic injury to the victim, where "such conduct has the purpose or effect of

unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." Id. A hostile working environment exists where sexual harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. at 67.

In the Sixth Circuit, the test for whether or not sexual harassment rises to the level of a hostile work environment is whether the harassment is "conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under

like circumstances." Rabidue v. Osceola Refining Company, 805 F.2d 611, 620 (6th Cir. 1986). The plaintiff must also prove that her injury "resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency." Id. Once the objective "reasonable person" test is met, the court must next determine if the victim was subjectively offended and suffered an injury from the hostile work environment. Id. See also Highlander v. K.F.C. National Management Co., 805 F.2d 644, 650 (6th Cir. 1986).

The elements of a cause of action for hostile work environment discrimination under Title VII are:

> (1) the employee was a member of a protected class; (2) the employee was

> subjected to unwelcomed sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff, and (5) the existence of respondeat superior liability.

Rabidue, 805 F.2d at 619-620.

Here, there is no question but that elements one, three and five are fulfilled. Teresa Harris is a woman, and thus a member of a protected class; there is no proof that male employees of Forklift were subjected to the conduct complained of by plaintiff; and Charles Hardy, the party allegedly responsible for committing the sexual harassment, is President of the

company, thus eliminating the issue of respondeat superior liability.

I also believe that element two is fulfilled; Charles Hardy really did not deny that he made the sexually crude comments complained of by plaintiff. His excuse is that he thought of his conduct as joking, and up until August 18, 1987, he thought plaintiff thought so too. The disputed issue involves element four, that is, whether Hardy's continuous inappropriate sexual comments rose to the level of creating a hostile work environment.

I believe that this is a close case, but that Charles Hardy's comments cannot be characterized as much more than annoying and insensitive. The other women working at Forklift considered Hardy a joker. Most

of Hardy's wisecracks about females' clothes and anatomy were merely inane and adolescent, such as the running joke that large breasted women are that way because they eat a lot of corn. Hardy's coin dropping and coin-in-the-pocket tricks also fall into this category. I appreciate that plaintiff, as a management employee, was more sensitive to these comments than clerical employees, who it appears were conditioned to accept denigrating treatment.

At trial, plaintiff tried to get far too much mileage out of Hardy's comment that they would negotiate her raise at the Holiday Inn. The comment shows Hardy to be a man with a bad sense of humor, but it was not a sexual proposition. Plaintiff took

the comment as a joke at the time and knew that it stemmed from the fact that management meetings were often conducted at the Holiday Inn. Hardy's comments to plaintiff that she was a "dumb ass woman," and "you're a woman, what do you know," were more objectionable. Hardy's comment to plaintiff suggesting that she promised sexual favors to a customer in order to secure an account was truly gross and offensive. However, it should be noted that this comment was not made in front of a client, but in front of other employees at Forklift.

I believe that some of Hardy's inappropriate sexual comments, especially this last one, offended plaintiff, and would offend the reasonable woman. However, I do

not believe they were so severe as to be expected to seriously affect plaintiff's psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

Neither do I believe that plaintiff was subjectively so offended that she suffered injury, despite her testimony to the contrary. Plaintiff repeatedly testified that she loved her job. She and her husband socialized with Hardy and his wife, and plaintiff often drank beer and socialized with Hardy and her co-workers. Plaintiff herself cursed and joked and appeared to her co-workers to fit in quite well with

the work environment. The channels of communication were open between plaintiff and Hardy, but plaintiff was not inspired to broach the issue with him until she had been working at Forklift for over two years. Although Hardy may at times have genuinely offended plaintiff, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to plaintiff.

It is helpful to compare the instant case to Rabidue, wherein the Sixth Circuit plaintiff was not the victim of a hostile work environment. In Rabidue, the plaintiff was subjected to a pattern of sexual harassment by a co-worker who "customarily made obscene comments about women generally, and, on occasion, directed such obscen

ities to the plaintiff." 805 F.2d at 615. This annoyed the plaintiff as well as her female co-workers. On top of this, several co-workers displayed pictures of naked women about the work area. In finding that the plaintiff was not subjected to a hostile work environment remediable under Title VII, the Sixth Circuit noted that cases recognizing a violation of Title VII were based on a pattern of sexual harassment more egregious than that complained of by plaintiff. Id. at 622, n. 7. These cases involved sexual harassment directed at the plaintiff for a period of time by more than one fellow employee, in the form of requests for sexual relations or actual offensive touching. Id.

I find that the degree of sexual hostility that existed in Teresa Harris' work environment was comparable to that in Rabidue. In both cases, the perpetrator of the offensive conduct was chiefly one person. He was vulgar and crude, but the sexual conduct was not in the form of sexual propositions or physical touching. It is true that Ms. Harris' nemesis was her supervisor and owner of the company, whereas Ms. Rabidue's was merely a co-worker. However, Ms. Rabidue was able to show that the offensive conduct was severe enough to annoy her female co-workers, which Ms. Harris has been unable to show.

Constructive Discharge

As plaintiff has not shown that she

was subjected to a hostile work environment, neither can she show that she was constructively discharged. An employee is not constructively discharged unless she can show that a reasonable person in her shoes that is subjected to the same working conditions would have found the working conditions so unpleasant that she would have felt compelled to resign. Wheeler v. Southland Corp., 875 F.2d 1246, 1249 (6th Cir. 1989); see also Yates v. AVCO Corp., 819 F.2d 630 (6th Cir. 1987). Further, she must show some proof of intent on the part of the employer that the environment would cause her to resign. 875 F.2d at 1249. Intent can be shown by proof that circumstances were so unpleasant that it was reasonably foreseeable to the employer that

the plaintiff would resign. This is based on the precept that a person is held to intend the foreseeable consequences of his or her conduct. This intent factor is usually shown by proof of some "aggravating factor," in addition to the proof of discrimination alone.

The undersigned is moved by the fact that after plaintiff spoke with Hardy on August 18th, thus making him aware that his sexual comments were not jokes to her, Hardy did not stop altogether. The proof showed that he stopped for awhile, but then made the crude "promised him some 'bugger'" comment. However, since things were just annoying and not that bad before, I do not believe that this additional comment created foreseeability that plaintiff would in

fact, resign. It would, of course, create foreseeability that plaintiff would again speak with Charles Hardy or reprimand him sharply at the time of the comment. It would not drive a reasonable person, even a reasonable female manager, to quit.

Other Terms and Conditions of Employment

In addition to the hostile work environment, plaintiff brings a claim of disparate treatment in terms of her pay, bonus, car allowance and failure to receive a 1987 annual review. The proof does not bear out plaintiff's claims of disparate treatment in these particulars.

As set forth in McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973), the basic allocation of burden of proof in a

Title VII case is as follows: First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate, non-discriminatory reason for the employee's termination or rejection." Id, at 802. Third, should the defendant carry this burden, the plaintiff must then prove by a preponderance of the evidence that the reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. In order to show that the articulated reason is a pretext, the plaintiff may either show that a discriminatory reason was the more likely motiva

tion or that the articulated reason is unworthy of belief. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716 (1983).

Plaintiff simply was not paid less than her male co-managers, and has thus failed to set forth in a prima facie case of discrimination because she was not treated disparately. The elements of a prima facie case vary according to the specific factual situation, but, at a minimum, plaintiff must show she was treated differently from similarly situated males. See e.g., Texas Department of Community Affairs v. Burdine, 500 U.S. 248, 253 (1981). To establish a claim of unequal pay under Title VII, "plaintiff must show that different wages were paid to

employees of opposite sexes for substantially equal work." Henry v. Lennox Industries, Inc., 768 F.2d 746, 752 (6th Cir. 1985).

Nor was plaintiff able to show that her failure to receive a formal 1987 annual review was an example of disparate treatment. Plaintiff felt that her 1987 annual review was cursory, but she could not show that some similarly situated male employees were treated more favorably.

Defendants articulated a legitimate, non-discriminatory reason for providing plaintiff with a different form of car allowance and a lesser bonus than her co-worker managers. She was reimbursed on a mileage basis rather than a flat rate or having a company car because she did not

drive around town as often as other managers, or drive to Kentucky. She received less of a bonus than other managers because she had not worked at Forklift as long, and because her salary was based partially on commission and was thus under her control. She received more of a bonus than the other manager who had worked less time than she. Plaintiff did not offer any evidence that Forklift's proffered reasons for the differential bonus and car allowance treatment are unworthy of credence. Plaintiff has simply failed to raise an inference of discriminatory intent, a crucial element of proof in a Title VII case brought under the disparate treatment theory. Grano v. The Department of Development of the City of Columbus, 637 F.2d 1073, 1081 (6th Cir.

1980). I thus concede that these legitimate, non-discriminatory reasons were not pretext.

RECOMMENDATION

The undersigned recommends that plaintiff's Title VII claims be DISMISSED.

The undersigned further recommends that each party bear its own cost. An award of attorney's fees to a prevailing party is within the District Court's discretion, and there is no evidence to indicate that the defendant in this case is financially unable to assume these fees, that plaintiff's claim is frivolous, unreasonable or groundless, or that plaintiff

pursued the action in bad faith. Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985).

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice, and must state with particularity the specific portions of this Report, or the proposed findings or recommendation to which objection is made. Failure to file objections within the specified time waives the right to appeal the District Court's Order. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,

/s/ Ken Sandidge, III
United States Magistrate

FILED: November 27, 1990
Leonard E. Bush
Deputy Clerk